IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-529

MONTANA POWER COMPANY, *et al.*,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

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and Nos. 76-585, 76-594, 76-603, 76-619, 76-620

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RESPONSE BY PETITIONERS IN NOS. 76-529, 76-594 AND 76-603 TO MOTION TO DISMISS THE WRITS OF CERTIORARI AS IMPROVIDENTLY GRANTED OR TO VACATE AND REMAND AND TO MOTION OF INTERVENOR RESPONDENTS SUGGESTING MOOTNESS

[List of attorneys on inside cover]

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This Court granted the petitions for writ of certiorari and consolidated the cases, on April 4, 1977, to consider the following questions:

1. Whether regulations promulgated by the Environmental Protection Agency to prevent the significant deterioration of air quality are authorized by the Clean Air Act?

2. Whether the Clean Air Act permits the Environmental Protection Agency to adopt regulations which grant to Federal land managers and Indian governing bodies power to reclassify Federal and Indian lands within their jurisdiction?

Petitioners filed their briefs on the merits on or before May 19, 1977, within the time allowed by the Court's Rules without extension. Respondents' time in which to file their briefs on the merits was extended by the Clerk until August 22, 1977.

Instead of filing briefs on the merits, however, respondents filed the motions to which this response is directed. The Motion of Intervenor Respondents Suggesting Mootness was filed on August 22, 1977, and the Government's Motion to Dismiss the Writs of Certiorari as Improvidently Granted or to Vacate and Remand was filed on August 26, 1977. For the reasons stated below, we urge that those motions be denied and that the Court proceed to hear and decide these consolidated cases.*

Respondents do not attempt, in their motions, to refute the demonstration in petitioners' briefs that EPA's significant deterioration regulations are not authorized by the Clean Air Act as it read when those regulations were issued and when they were upheld by the Court of Appeals, and thus that the court below erred in holding that they were so authorized. Respondents contend in essence, however, that the regulations have been ratified by the Congress in enacting the Clean Air Act Amend-

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* Pursuant to another motion by the intervenor respondents, the Clerk has allowed them 30 days after the Court acts upon their motion suggesting mootness in which to file their brief on the merits.

ments of 1977 (P.L. 95-95), which was approved by the President on August 7, 1977.

It is true that Section 127(a) of the 1977 Amendments, which is set forth in the Appendix to the Government's motion, amends Title I of the Clean Air Act to add a new Part C setting forth detailed provisions (§§ 160-169 of the Act as so amended) relating to the prevention of significant deterioration of air quality. Even assuming that those provisions are constitutional, however, they do not immediately supersede EPA's regulations or otherwise generally have immediate effect. Rather, Section 168 of the amended Act provides that:

> "(a) Until such time as an applicable implementation plan is in effect for any area, which plan meets the requirements of this part to prevent significant deterioration of air quality with respect to any air pollutant, applicable regulations under this Act prior to enactment of this part shall remain in effect to prevent significant deterioration of air quality in any such area for any such pollutant except as otherwise provided in subsection (b).
>
> "(b) If any regulation in effect prior to enactment of this part to prevent significant deterioration of air quality would be inconsistent with the requirements of section 162(a), section 163(b) or section 164(a), then such regulations shall be deemed amended so as to conform with such requirements. In the case of a facility on which construction was commenced in accordance with this definition after June 1, 1975, and prior to the enactment of the Clean Air Act Amendments of 1977, the review and permitting of such facility shall be in accordance with the regulations for the prevention of significant deterioration in effect prior to the enactment of the Clean Air Act Amendments of 1977."

Hence, until such time as a State properly adopts an "applicable implementation plan . . . which meets the

requirements of" the 1977 Amendments, the areas within that State will not be subject to any requirements for the prevention of significant deterioration unless there are "applicable regulations under [the Clean Air] Act prior to enactment of this part to prevent significant deterioration of air quality in any such area . . . ." Of course, the basic issue on the merits in these cases is whether, under the Clean Air Act "prior to enactment of the" 1977 Amendments, there validly could be any "applicable regulations . . . to prevent significant deterioration of air quality," and the second question before the Court is whether such regulations, even if otherwise valid, could validly include the provisions regarding reclassification of Federal and Indian lands.

We do not believe that it is by any means so clear as respondents seem to assume, therefore, that the Congress has ratified EPA's regulations so as to moot any arguable issue concerning their validity. And, while the "Congress may of course do by ratification what it might have authorized," the legislation claimed to have effected such ratification "must plainly show a purpose to bestow the precise authority which is claimed." *Ex Parte Endo*, 323 U.S. 283, 303 n. 24 (1944); accord, *Greene* v. *McElroy*, 360 U.S. 474, 505 n. 30 (1959).

Some further indication that the 1977 Amendments were not intended in effect to decide the issues before this Court in these cases is afforded by the savings provisions in Section 406 of those Amendments, which are set forth in full in the Appendix hereto. Section 406(a) provides in part that "[n]o suit, action, or other proceeding lawfully commenced . . . against the Administrator . . . in his official capacity or in relation to the discharge of his official duties under the Clean Air Act, *as in effect immediately prior to the date of enactment of this Act shall abate by reason of the taking effect of the amendments made by this Act.*" (Emphasis added.) Respond-

ents' motions appear to amount in effect to a request that the Court abate these proceedings, which concern the validity of an action which the Administrator of EPA took in his official capacity under the Clean Air Act "as in effect immediately prior to the date of enactment of" the 1977 Amendments, "by reason of the taking effect of" those Amendments.

Furthermore, Section 406(b) provides in part that "[a]ll rules, regulations . . . , or other actions *duly* issued, made or taken by or pursuant to the Clean Air Act as in effect immediately prior to the date of enactment of this Act . . . shall continue in full force and effect after the date of enactment of this Act until modified or rescinded in accordance with the Clean Air Act as amended by this Act." (Emphasis added.) If EPA's significant deterioration regulations were not "duly issued, made or taken by or pursuant to the Clean Air Act as in effect immediately prior to the date of enactment of" the 1977 Amendments, but rather were contrary to those statutory provisions as petitioners have demonstrated in their briefs on the merits, those regulations are not saved by Section 406(b).

We do not mean to suggest to the Court that respondents may not have arguments to support the proposition that EPA's regulations have been ratified by the 1977 Amendments. We have sought only to show that there also are arguments to the contrary, so that respondents' bare assertions that ratification has occurred should not be accepted by the Court prior to full briefing and oral argument of that contention. Indeed, the ratification contention is simply another ground which, if sound, would support the validity of EPA's regulations, and thus most appropriately could be included in respondents' briefs on the merits together with any other contentions they may have as to why those regulations are valid.

We recognize that, under the statutory scheme adopted in the 1977 Amendments, revised State implementation plans which meet "the requirements of this part to prevent significant deterioration of air quality" eventually will be adopted. A very substantial period will elapse, however, before that point is reached. Under Section 406 (d) (2) of the 1977 Amendments, a "State required to revise its applicable implementation plan by reason of any amendment made by this Act" has the "later of" one year after the enactment of the 1977 Amendments or nine months after the promulgation by EPA "of any regulations under an amendment made by this Act which are necessary for the approval of such plan revision," in which to submit to EPA its revised implementation plan. Section 161 of the amended Clean Air Act requires the promulgation by EPA of regulations regarding "emission limitations and such other measures as may be necessary" to be included in "each applicable implementation plan" for the prevention of significant deterioration in accordance with the amended Act. Hence, the deadline for submitting revised State plans could be much more than a year after enactment of the 1977 Amendments, depending upon when EPA promulgates the necessary regulations. If the validity of such regulations should be litigated, substantial additional delay could be involved.

Moreover, submission of revised State implementation plans will not end the matter. Upon submission, they are subject to review and possible amendment by EPA under Section 110 of the Clean Air Act,* and EPA's actions in that regard also could be subject to litigation. Any litigation in regard to such matters could include issues as to the constitutionality of the significant deterioration provisions of the 1977 Amendments as well

* Section 110 has been amended in some respects by Sections 107 and 108 of the 1977 Amendments, but the basic procedures under which State implementation plans and revisions thereof are subject to review and revision by EPA have not been changed.

as issues as to compliance with those provisions. In short, while no one can know at this time when each of the 50 States will have a valid implementation plan which meets the requirements of the 1977 Amendments, several years could well elapse before that occurs, even assuming that no constitutional problems will be involved.

Accordingly, the issues before the Court regarding the validity of EPA's existing regulations (including the issue as to whether those regulations have been ratified) retain very substantial importance. If the Court should conclude that those regulations are not valid, a major emitting facility on which construction is commenced prior to the adoption of a valid and applicable State implementation plan will not be subject to any requirements regarding the prevention of significant deterioration. In view of the continued viability and importance of the issues before the Court in these cases, the Court should neither regard those issues as moot nor dismiss the writs of certiorari as improvidently granted, and should proceed to a decision on the merits after briefing has been completed and oral argument has been heard.

Respondents also suggest, as an alternative, that the Court remand these cases to the Court of Appeals for further consideration in light of the 1977 Amendments. We submit, however, that such a course makes no sense at all, as the Government virtually concedes (Motion, at 7). Insofar as we are aware, no one contends that the 1977 Amendments provide an additional ground for arguing that EPA's existing regulations were or are invalid. And, since the Court of Appeals already has held that those regulations are valid, any views that it might express on such a remand regarding the effect of the 1977 Amendments would be pure *dicta* amounting in effect to an advisory opinion. As we see the matter, the only situation in which it would be appropriate to remand these cases to the Court of Appeals for consideration in

the light of the 1977 Amendments would be after this Court decides that EPA's regulations were not authorized by the Clean Air Act prior to those Amendments. In that circumstance, the Court possibly might prefer to reverse the decision below and remand for consideration by the Court of Appeals of respondents' ratification contention, although we do not urge that course and believe that the Court should decide all the issues, including ratification, now that these cases are before it.

If the Court should agree with respondents' contention that enactment of the 1977 Amendments has mooted the issues in these cases and that "no controversy" remains (Government Motion, at 6), then the Court should follow its "established practice . . . to reverse or vacate the judgment below and remand with a direction to dismiss." *United States* v. *Munsingwear*, 340 U.S. 36, 39 (1950). If that is done, "the rights of all parties are preserved" and "none is prejudiced by a decision which in the statutory scheme was only preliminary" (*id.*, at 40), and which, in these cases at least, may well be erroneous. Even if the 1977 Amendments have ratified EPA's regulations, situations may arise in which the validity of those regulations under the Clean Air Act as it read prior to those Amendments could be significant.

If the "ratified" regulations should be applied to prevent use of facilities on which construction commenced between June 1, 1975 and the date of enactment of the 1977 Amendments, for example, the constitutional validity of that action could depend upon whether or not the regulations were valid prior to such "ratification." If the regulations were invalid prior to "ratification," the 1977 Amendments could hardly be regarded as merely "a curative statute aptly designed to remedy mistakes and defects in the administration of justice where the remedy can be applied without injustice," *Graham & Foster* v. *Goodcell*, 282 U.S. 409, 429 (1931), but rather

would appear to constitute a retroactive deprivation of property rights without compensation and without due process of law. See, *e.g.*, *Forbes Boat Line* v. *Board of Commrs.*, 258 U.S. 338 (1922). In addition, since the time at which construction "commenced" for purposes of the amended Act depends in part upon when "all necessary preconstruction approvals or permits required by Federal, State, or local air pollution emissions and air quality laws and regulations" have been obtained (§ 169(2) of the amended Act), the validity of the regulations prior to the presumed ratification could be important in that regard. If those regulations were invalid, the preconstruction permit or approval which they required in terms would not have been "necessary" prior to enactment of the 1977 Amendments even if those regulations otherwise would have been applicable.

Consequently, if this Court does not proceed to hear and decide these cases on the merits, it should reverse or vacate the judgment of the Court of Appeals and remand the case with directions to dismiss the proceedings. For the reasons which we have stated, however, we urge the Court to hear and decide these cases on the merits.

Respectfully submitted,

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APPENDIX

SAVING PROVISION; EFFECTIVE DATES

SEC. 406. (a) No suit, action, or other proceeding lawfully commenced by or against the Administrator or any other officer or employee of the United States in his official capacity or in relation to the discharge of his official duties under the Clean Air Act, as in effect immediately prior to the date of enactment of this Act shall abate by reason of the taking effect of the amendments made by this Act. The court may, on its own motion or that of any party made at any time within twelve months after such taking effect, allow the same to be maintained by or against the Administrator or such officer or employee.

(b) All rules, regulations, orders, determinations, contracts, certifications, authorizations, delegations, or other actions duly issued, made, or taken by or pursuant to the Clean Air Act as in effect immediately prior to the date of enactment of this Act, and pertaining to any functions, powers, requirements, and duties under the Clean Air Act, as in effect immediately prior to the date of enactment of this Act, and not suspended by the Administrator or the courts, shall continue in full force and effect after the date of enactment of this Act until modified or rescinded in accordance with the Clean Air Act as amended by this Act.

(c) Nothing in this Act nor any action taken pursuant to this Act shall in any way affect any requirement of an approved implementation plan in effect under section 110 of this Act or any other provision of the Act in effect under the Clean Air Act before the date of enactment of this section until modified or rescinded in accordance with the Clean Air Act as amended by this Act.

(d) (1) Except as otherwise expressly provided, the amendments made by this Act shall be effective on date of enactment.

(2) Except as otherwise expressly provided, each State required to revise its applicable implementation plan by reason of any amendment made by this Act shall adopt and submit to the Administrator of the Environmental Protection Administration such plan revision before the later of the date—

(A) one year after the date of enactment of this Act, or

(B) nine months after the date of promulgation by the Administrator of the Environmental Protection Administration of any regulations under an amendment made by this Act which are necessary for the approval of such plan revision.